

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

BLUE SPIKE, LLC	§	
<i>Plaintiff,</i>	§	
	§	Civil Action No. 6:12-cv-499
	§	(Lead Case)
v.	§	
	§	JURY TRIAL DEMANDED
TEXAS INSTRUMENTS, INC.	§	
<i>Defendant.</i>	§	
	§	
<hr/>	§	
BLUE SPIKE, LLC	§	
<i>Plaintiff,</i>	§	Civil Action No. 6:13-cv-109
	§	(Consolidated with 6:12-cv-499)
v.	§	
	§	JURY TRIAL DEMANDED
AMANO CINCINNATI, INC.	§	
<i>Defendant.</i>	§	
	§	
<hr/>	§	

**DEFENDANT AMANO CINCINNATI, INC.’S MOTION  
TO STRIKE PLAINTIFF’S SURREPLY**

Defendant, Amano Cincinnati Inc. (“Amano”), hereby moves to strike the Surreply to Defendant’s Motion to Dismiss (“Surreply”) [Dkt. No. 742] filed by Plaintiff, Blue Spike, LLC (“Blue Spike”), as it is non-responsive to the Amano’s Opposition to Defendant’s Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the “Reply”) [Dkt. No. 687] and is an impermissible expansion of the Complaint [Dkt. No. 1 in Case No. 6:13-cv-109].

**I. RELEVANT FACTS**

The originally filed Complaint alleged infringement of four (4) patents (“patents-in-suit”) on the basis that:

Defendant makes, uses, offers for sale and/or imports into the U.S. products, systems and/or services including, but not limited to, its HandPunch Biometric Terminals (such as its 1000, 1000E, 2000, 3000, and 4000), and Time Guardian Fingerprint software (“Accused Products”), which infringe one or more claims of the Patents-in-Suit.

Complaint at ¶ 27. The list of “Accused Products” included time management software as well as the HandPunch terminals. Amano moved to dismiss the Complaint for failure to state which patents are infringed by the “Accused Products.” *See* Defendant Amano Cincinnati, Inc.’s Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the “Motion to Dismiss”) [Dkt. No. 577]. Blue Spike’s Opposition, without clarifying which patents-in-suit were infringed by the Time Guardian Software the HandPunch terminals, argued that “[b]y naming the four patents-in-suit and specific accused products, Blue Spike has placed Amano on notice as to what it must defend.” *See* Plaintiff’s Opposition to Defendant’s Motion to Dismiss at page 3 (hereinafter “Blue Spike’s Opposition”) [Dkt. No. 650]. Blue Spike’s Surreply does not clarify any issues raised in Amano’s Response and mischaracterizes the record as to what was pleaded in the Complaint. *See* Surreply at page 3.

## II. ARGUMENT

Blue Spike’s Surreply alleges that “[t]he salient facts are these: Blue Spike pleaded that the patents-in-suit are foundational to all of today’s widespread biometric technology; that Amano makes biometric products; and that at least some of Amano’s biometric products have no substantial non-infringing use.” The fallacy in this argument is highlighted by the Complaint allegation that Blue Spike owns over 66 Patents and “[m]any of Blue Spike’s patents are foundational to today’s robust markets for content.” Complaint at ¶ 2 (emphasis added). Blue Spike *did not* plead that the patents-in-suit are “foundational to all of today’s widespread biometric technology.” It is facially implausible that Blue Spike’s patents are foundational to a

technological field of art that long pre-dated the patents-in-suit. While a court accepts pleadings as factual for motion purposes, it does not have to accept self-serving conclusions. (See *Ashcroft v. Iqbal*, 556 U.S. 662 (U.S. 2009) (holding that “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth”). A court does not have to accept a statement that “the world is flat” because it appears in a pleading.

### III. CONCLUSION

Blue Spike’s Surreply should be stricken as it does not respond to Amano’s Reply and is simply an improper attempt to amend the Complaint. Blue Spike’s Complaint fails to provide Amano with notice of the claims it must defend with sufficient facts and specificity to support the alleged claims of direct infringement, contributory infringement, induced infringement and willful infringement.<sup>1</sup> The Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

By: s/Anthony S. Volpe

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<sup>1</sup> Amano notes that Blue Spike concedes that willfulness should be dismissed; however, Blue Spike has not filed an amended complaint.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of **Defendant Amano Cincinnati, Inc.’s Motion to Strike Plaintiff’s Surreply to Defendant’s Motion to Dismiss** is being served on all counsel of record via the Court’s CM/ECF system on this 22nd day of May 2013.

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**CERTIFICATE OF CONFERENCE**

This motion is opposed. Pursuant to Local Rule CV-7(h), I, Anthony S. Volpe, counsel for Amano Cincinnati, Inc., discussed the basis for this Motion with Plaintiff’s counsel, Christopher A. Honea, by telephone on May 21, 2013, at which time Plaintiff’s counsel stated that it opposed this Motion.

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